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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of DARIN E. and
DAVID A. PEARCE.

DARIN E. JOHNSON,

Appellant,

v.

DAVID A. PEARCE,

Respondent.

D054642

(Super. Ct. No. DN108539)

APPEAL from an order of the Superior Court of San Diego County, Earl H.
Maas III, Judge. Affirmed.

David A. Pearce appeals from an order denying his application to modify a stipulated order of child support. As we will explain, the trial court was within its discretion to deny Pearce's application on the ground that Pearce had not established a change in circumstances. Accordingly, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Pearce and Darin E. Johnson, who are divorced, have two minor children. After the trial court entered an order in February 2008 modifying custody, Pearce and Johnson, through their attorneys, spent several months negotiating a stipulation modifying child support.

On August 26, 2008, at a hearing on an order to show cause to modify child support, the parties presented a signed stipulation,¹ and the trial court entered it as an order of the court. The stipulation provided that for the time period from April 24, 2008, through June 30, 2008, *Johnson* would pay *Pearce* \$129 per month in child support, and for the time period starting July 1, 2008, *Pearce* would pay *Johnson* \$814 per month in child support.² The stipulation did not set forth any facts upon which the agreed-upon support amounts were based. Although Pearce did not attend the hearing at which the court signed the stipulation, at the conclusion of the hearing Pearce's attorney stated to the trial court, "In the interest of full disclosure, I received a message that Mr. Pearce lost

¹ Johnson's signature is dated August 26, 2008. Pearce's signature is not dated, but the faxed signature page on which Pearce's signature appears bears a fax machine date stamp of August 25, 2008.

² The change in the amount of child support as of July 1, 2008, was due to the fact that a third child of Pearce and Johnson, who resided with Pearce, turned 18 years old and graduated from high school.

his job. I don't have any details." He commented, "We may be seeing you again soon"3

Three days later, on August 29, 2008, Pearce filed an order to show cause to modify child support. Pearce sought to have his obligation to pay child support "suspend[ed]" as of September 1, 2008, on the basis that he had been unemployed since August 1, 2008. He explained, "For the past year, I have been employed by the military as a reserve. Recently, my orders expired on August 1, 2008 and thus I am currently unemployed at this time and I do not have any gross income from employment."<4 Johnson opposed the application on the ground that Pearce had the ability to obtain comparable employment.

At a hearing held on October 14, 2008, the trial court continued the issue of child support to December 19, 2008, and requested that the parties address "[w]hether the filing of the Stipulation and Order by the parties on August 26, 2008, precludes [Pearce] from requesting a modification of child support pursuant to his Order to Show Cause filed

3 We are at a loss to understand (1) why counsel for Pearce submitted the stipulation in light of the knowledge that there had already been a change in status of Pearce's employment and income; and (2) why the trial court, upon learning of the change, accepted the stipulation.

4 In subsequent declarations, Pearce provided additional details about the termination of his employment. He explained that he was employed by the United States Marine Corps Reserve under a set of involuntary orders lasting approximately two years. The orders expired as of August 1, 2008, and he was not provided with new orders. Pearce's last earnings statement in the record is dated August 1, 2008, covering the period August 1 through 31, and Pearce stated that he "was still receiving compensation through August 15, 2008."

August 29, 2008." The parties then submitted additional evidence to the trial court establishing they had been negotiating the stipulation for several months and had calculated the stipulation for child support using the DissoMaster program based on Pearce's income before his employment terminated on August 1, 2008.

After considering the parties' supplemental briefing and declarations, the trial court denied Pearce's application to modify child support. Although observing that it had discretion to modify the child support order, the trial court explained that it would not exercise its discretion to do so because Pearce's employment had already terminated at the time he entered into the stipulation, and there accordingly had been no change in circumstance from the time that the stipulation was entered into. Specifically, the trial court stated, "I'm using my discretion in finding it's not appropriate to change [the support order] in this circumstance because [Pearce is] in the exact same situation today that he was on the date that he entered into the stipulation to pay support to [Johnson] in the amount of \$814 per month." Further explaining its decision, the trial court noted that "this was an extremely contentious case . . . where the parties were using the legal process, basically, to batter each other." The trial court disapproved of what it viewed as a misuse of the system, explaining that "filing a new motion three days after reaching a stipulation and having the court order it" is "not the way the system is set up to work." Observing that "[Pearce] knew he was out of the Marine Corps when he signed the stipulation," the trial court stated that "two days later filing a new motion doesn't strike me as consistent with the concept of reaching a stipulation."

II

DISCUSSION

The sole issue presented is whether the trial court erred in denying Pearce's application to modify child support. "[A] determination regarding a request for modification of a child support order will be affirmed unless the trial court abused its discretion," and "[t]he reviewing court will resolve any conflicts in the evidence in favor of the trial court's determination.'" (*In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, 1233, 1234 (*Williams*).)

As provided in Family Code section 3651, subdivision (a), an order of child support "may be modified or terminated at any time as the court determines to be necessary." (*Ibid.*) However, "[s]tatutory procedures for modification of child support 'require a party to introduce admissible evidence of *changed circumstances* as a necessary predicate for modification.' [Citations.] The burden of proof to establish that changed circumstances warrant a downward adjustment in child support rests with the supporting spouse." (*In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 556, italics added; see also *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 298 (*Cheriton*) [party seeking modification of child support order must "introduce admissible evidence of changed circumstances as a necessary predicate for modification"]; *In re Marriage of Brinkman* (2003) 111 Cal.App.4th 1281, 1292 ["A party seeking a modification must present evidence that establishes a change of circumstances"; and "[a] child support order which is not supported by evidence of change of circumstances, is an abuse of discretion."].) "There are no rigid guidelines for judging whether circumstances have

sufficiently changed to warrant a child support modification. So long as the statewide statutory formula support requirements are met ([Fam. Code,] § 4050 et seq.), the determination is made on a case-by-case basis and may properly rest on fluctuations in need or ability to pay.' [Citations.] The ultimate determination of whether the individual facts of the case warrant modification of support is within the discretion of the trial court." (*Leonard*, at p. 556, italics omitted.)⁵

We note that pursuant to Family Code section 4065, subdivision (d), "[w]here the parties have stipulated to a child support order that is *below* the amount established by the statewide uniform guideline, the order may be modified to guideline level or above *without a showing of changed circumstances*." (*Williams*, *supra*, 150 Cal.App.4th at p. 1234, citing Fam. Code, § 4065, subd. (d), italics added.) However, case law is clear that when a stipulation sets child support *at or above* the guideline amount, a party may obtain a modification of child support *only* upon a showing of changed circumstances.

⁵ Citing *In re Marriage of Thomas* (1981) 120 Cal.App.3d 33, Pearce argues that "evidence of changed circumstances is not always required to modify a child support order." *Thomas* is not applicable here. In that case, the parties entered into a stipulated child support order that did not set forth the circumstances under which the stipulation was made, and several years later one of the parties sought to obtain a modification of the order, relying solely on the parties' present financial circumstances and not explaining the circumstances on which the earlier stipulation was based. (*Id.* at pp. 34-35.) *Thomas* held that "[i]n the absence of any evidence of circumstances under which the earlier order was made, the court acted within its discretion in granting" the application to modify child support. (*Id.* at p. 35.) *Thomas* stressed, however, that "[o]n motion to modify the resisting party may assert and show *the lack of change* as a bar to the motion." (*Ibid.*, italics added) Here, in contrast to *Thomas*, the record contains ample evidence of the circumstances under which the stipulation was entered into, and the trial court was able to rely on that evidence for its conclusion that circumstances had not changed.

(*Williams*, at p. 1235 ["assuming that the stipulated child support order . . . was at the guideline amount, a showing of changed circumstances was a necessary predicate to an upward modification of the child support order"]; *In re Marriage of Laudeman* (2001) 92 Cal.App.4th 1009, 1016 ["a child support order based upon a stipulation to pay more than the uniform guideline formula amount cannot be modified downward unless the obligor presents admissible evidence of changed financial circumstances"].) The parties do not contend that the stipulation at issue here resulted in a below guideline child support order, and as we have explained, the evidence in the record indicates that the stipulated order was based on the guidelines, using the DissoMaster program, but premised on Pearce's income in the United States Marine Corps Reserve. Accordingly, a change of circumstance was required for Pearce to obtain a modification of child support.

The applicable inquiry, therefore, is whether Pearce established a change in circumstances between the time that the stipulated child support order was entered on August 26, 2008, and the date that Pearce sought to obtain a modification of that order. As we will explain, the trial court was well within its discretion to deny Pearce's application on the ground that circumstances had not changed.

Specifically, Pearce's employment terminated on August 1, 2008, and Pearce claims to have been paid only through August 15, 2008. Accordingly, at the time that Pearce entered into the stipulation and his attorney submitted the stipulation to the court on August 26, 2008, Pearce was unemployed and not receiving any income. Three days later on August 29, 2008, when Pearce filed his application to modify child support, the circumstances had not changed, and Pearce made no showing that those circumstances

had changed in the interim between his August 29, 2008 application and the trial court's ruling on December 19, 2008. Although Pearce attempts throughout his appellate briefing to characterize his financial situation as not changing until September 1, 2008, when he did not receive a paycheck for September, we reject Pearce's characterization of the facts. As the trial court observed, Pearce's employment ended on August 1, 2008, and he knew that he would not be receiving any further paychecks after being paid through August 15, 2008. Accordingly, by the time Pearce entered into the stipulated August 26, 2008 child support order, his financial circumstances had already changed.⁶

Based on these facts, and the rule that a change of circumstances is required to obtain a modification of child support, we conclude that the trial court did not abuse its discretion in denying Pearce's application.

⁶ Citing the principle that "jurisdiction to make child support orders 'is limited to the conditions and circumstances *existing at the time they are made*'" (*Cheriton, supra*, 92 Cal.App.4th at p. 298, italics added), Pearce argues that "case law prohibited him from stipulating to an amount of child support reflecting that his employment would be terminating in the near future," and therefore the stipulation should not bar him from seeking a modification of child support reflecting his unemployed status. We reject this argument because the evidence establishes that Pearce's employment had *already* terminated as of August 26, 2008, when the stipulation was filed.

DISPOSITION

The order is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

McINTYRE, J.